No. 3926

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY KOCKOS and ANDREW KOCKOS, copartners doing business under the firm name and style of Kockos Bros. and KOCKOS BROS. (a partnership),

Plaintiffs in Error,

vs.

C. ITOH & CO., LTD. (a corporation),

Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFFS IN ERROR.

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BRYANT-WALSH PRINTING CO., SAN FRANCISCO

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Application and petition of plaintiffs in error for rehearing in the above entitled action and matter respectfully shows:

That judgment was pronounced in said cause by the United States Circuit Court of Appeals for the Ninth Circuit on the 2nd day of April, 1923,

affirming the judgment of the District Court of the United States in favor of the defendant in error and against the plaintiffs in error.

Plaintiffs in error now petition that their application to have a rehearing by this Honorable Circuit Court upon the ground that the judgment pronounced by said court is erroneous in this:

First: That the decision of the United States Circuit Court for the Ninth Circuit is based upon the decision of Robinson v. United States, 13 Wall. 363, which decision was affirmed by Hostetter v. Park, 137 U. S. 30; Brown v. Rushville Furniture Co., 285 Fed. 376.

The facts of the case of Robinson v. United States, do not support the application of that decision to the case at bar.

In the case of Robinson v. United States, the contract provided for one million bushels of first quality clear barley to be delivered between the first of July, 1867 and the 30th day of June 1868, in such quantities and at such time as might be required for the use of the government troops, and at certain posts named.

> *"But there was no specification in the instrument, of any particular manner in which the barley was to be delivered, as whether loose, or in what is known as 'bulk', or in sacks.*
>
> Under this contract, Robinson & Co. delivered in sacks all the barley required, between July 1, 1867 and January 1st, 1868; how much, exactly, did not appear, but it was more than 30,000 pounds. On the 10th of January, 1868, being required to deliver 30,000 pounds more,

they tendered the quantity in bulk—that is to say, loose in wagons. The officer at the post where it was tendered, refused to receive it, because it was not in sacks. Thereupon, the contractor refused to deliver any more, and abandoned his contract altogether."

At page 363 the Supreme Court stated:

"It is obvious by the steps which the plaintiffs took to perform their contract, that there are two modes in which barley may be delivered, for they delivered part in sacks and tendered part in bulk. And it is equally obvious, on account of the additional cost, that they would not have delivered the barley in sacks for a period of six months, if the contract, on its face, was satisfied by delivery in bulk. *The contract, by its terms, is silent as to the mode of delivery, and although there are two modes in which this can be done, yet they are essentially different, and one or the other and not both must have been in the mind of the parties at the time the agreement was entered into.* In the absence of an express direction on the subject extrinsic evidence must of necessity be resorted to in order to find out which mode was adopted by the parties; and what extrinsic evidence is better to ascertain this than that of usage?"

The Robinson case, therefore, did not specify the method of delivery. The contract being silent, it was proper to resort to the usages prevailing to interpret the contract.

In the case at bar the contract was not silent upon the subject. It provided:

"Remarks: Seattle Chamber of Commerce Certificate final as to crop, count and condition."

By inserting that provision, the parties intentionally and purposely agreed that a third person should pass upon and determine whether the tender was within and in conformity with the terms of the contract. So that when the tender was made by the defendants in error, the Seattle Chamber of Commerce was requested to pass upon the shipment, and the Seattle Chamber of Commerce did so and determined that 1600 bags were of the count of 36/38. This determination was final and binding upon both of the parties.

The law is always a part and a portion of a contract, and by inserting the provision that the Seattle Chamber of Commerce Certificate must be final as to crop, count and condition, the following rule declared in California Sugar etc. Agency v. Penoyar, 167 Cal. 274, at page 279, was inserted into the contract:

> "Nothing is better settled than the rule that where the parties agree that the performance or non-performance of the terms of a contract, or the quantity, price or quality of goods sold, is to be left to the determination of a third person, his judgment or estimate is binding in the absence of fraud or mistake."

We, therefore, respectfully submit that the case at bar is not silent upon any subject upon which usage may be introduced for the purpose of completing the contract, and that the decision relied upon by this Honorable Court is based on a contract that was silent as to the mode of delivery, therefore the

authorities cited do not support the application of that doctrine in this case.

The question that the larger nuts are more valuable cannot be considered in this matter, as the Supreme Court of the United States stated in Norrington v. Wright, 115 U. S. 188-209, in quoting Lord Blackburn:

> "If the description of this article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. But the parties have chosen for the reasons best known to themselves to say: We bargained to take rice shipped in this particular region at that particular time on board that particular ship, and before the defendants can be compelled to take anything in fulfillment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for, otherwise they are not bound to take it."

We, therefore, respectfully request that this Honorable Court do reconsider its decision in this case, and in doing so that it place it in the position of the parties at the outset of their business relation. That they do offer and accept the Seattle Chamber of Commerce as the final inspector, and that they do so for the purpose of avoiding disputes between them and agree to stand by the decision of the inspector.

This being the fact the contract is not one which is silent upon any subject upon which usage or custom may be introduced to explain or vary, and

that therefore the trial court erred in permitting the introduction of the testimony of usage and custom.

Second: Plaintiffs in error further respectfully call the court's attention that this Honorable Court in its decision did not pass upon the question of plaintiffs' in error liability for the 400 bags which they offered to accept and pay for, and in support of this we wish to quote a statement of the trial court on the motion for non-suit:

> "I will say to you, Mr. Brownstone, my impression is rather against you on that, but I will hear you a little further. I have difficulty in seeing why you should be unwilling to deliver the 400 bags if the offer to make them was unconditional."

Wherefore, plaintiffs in error pray that their application for a rehearing be granted.

Dated, San Francisco,
May 1, 1923.

RAYMOND PERRY,
FORD & JOHNSON,
Attorneys for Plaintiffs in Error and Petitioners.

CERTIFICATE OF COUNSEL.

We hereby certify that we are of counsel for plaintiffs in error and petitioners in the above entitled cause and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
May 1, 1923.

RAYMOND PERRY,
GEO. K. FORD,
Attorneys for Plaintiffs in Error and Petitioners.